No. 77-1419

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

GRIFFIN B. BELL,
ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

*Petitioners,*

v.

SOCIALIST WORKERS PARTY, ET AL.,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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### Opinions Below

Contrary to petitioners' statement (Pet. 2), the district court rendered a bench opinion on the present issue on May 31, 1977, and a supplemental bench opinion on June 22, 1977 (Supp. App. 16a-54a).[1] The district court also rendered bench opinions on closely related jurisdictional questions on July 29, 1976 and November 3, 1977 (Resp. App. 3a, 58a).

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[1] References herein to "Supp. App. ——" are to pages in the Supplemental Appendix filed by petitioners. References to "Pet. ——" are to pages in the petition. References to "Resp. App. ——" are to pages in the separately bound appendix which respondents are filing with the Court simultaneously with this Brief in Opposition. The respondents' appendix contains relevant portions of transcripts of proceedings before the district court.

## Questions Presented

The question set forth in the petition is not before the Court. See *infra*, pp. 8-9. The questions actually presented here are the following:

1. Whether the court of appeals acted within its discretion in denying the government's petition for a writ of mandamus to vacate a district court order directing the FBI to make limited pretrial disclosure of relevant documents solely to respondents' counsel, under a protective order, where the court of appeals found that the order was within the power of the district court, involved no abuse of discretion, and raised no issues of first impression or of extraordinary legal significance?

2. Whether the court of appeals was correct in concluding that the pretrial discovery order was not directly appealable pursuant to 28 U.S.C. § 1291?

## Statement

Respondents contend that for decades the FBI employed informers to spy upon, disrupt and commit criminal and tortious acts against the Socialist Workers Party (SWP) and the Young Socialist Alliance (YSA), knowing that those organizations were engaged only in peaceful and legal activities. The complaint alleges that the FBI employed informers (i) to prevent the members of the organizations from obtaining employment, housing and licenses, to harm their reputations and to disrupt their personal lives; and (ii) to attempt to control the political activities of the organizations, disrupt their electoral activities, and create discord within the organizations, thereby interfering with the members' rights to free association,



speech and lawful political activity.[2] Respondents' allegations have been borne out by discovery in this case,[3] as well as by congressional committee hearings and reports,[4] although the full extent and scope of the FBI's use of informers against respondents remain to be established for the purposes of determining damages and formulating injunctive relief.

At issue is the disclosure under protective order to respondents' counsel alone of the files of 18 FBI informers. The district court, after reviewing these files *in camera*, concluded that the informers had "provided the FBI with a consistent recital" of the respondents' "peaceful, lawful, political activities, peaceful, lawful, personal activities and a total absence of any criminal activities or plans of any nature whatever," raising "a very serious question about whether there could be any justification for this exceedingly close surveillance after this kind of record had been developed for a period of a number of years; that is, the surveillance with absolutely no indication of violent or criminal activity" by respondents (Resp. App. 122a). The

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[2] Second Amended Complaint, paragraphs 26, 27, 30, 32, 41, 73, 73A, 73B, 74, 76, 87. Court of Appeals Joint Appendix, p. 456a.

[3] See the comments of the district court on this point (Resp. App. 129a-130a; Supp. App. 29a).

[4] See *Final Report of the Select Committee to Study Governmental Operations With Respect to Intelligence Activities*, United States Senate, 94th Cong. 2d Sess. (1976), Book II, page 8 (Church Committee), and the suppressed *Investigative Report of the Select Committee on Intelligence*, United States House of Representatives, 94th Cong., 1st Sess. (1975), made public by *The Village Voice*, Feb. 16, 1976. Both the Senate and the House committees concluded that the FBI's investigations of respondents served no legitimate law enforcement purpose. Those committees' reports and the discovery in this lawsuit were undoubtedly the chief factors in the Attorney General's decision on September 9, 1976 to order the FBI to terminate its investigations of the SWP and the YSA.

district court recognized that the FBI's use of informers against the respondents is the central issue in the case, and that discovery on this issue has been inadequate to a fair adjudication of respondents' claims (Resp. App. 47a-57a; Supp. App. 21a-32a).

The focus of discovery on the informer issue has been upon the scope and character of the informers' activities. The identities of informers, *per se*, has never been the principal issue in dispute,[5] contrary to the government's assertion (Pet. 3).

Discovery on informer activities was attempted in the first instance through interrogatories propounded to the FBI in January, 1974. The interrogatory answers initially supplied by the FBI in June, 1976 proved to be incorrect and incomplete, and showed more than one deliberate falsification. Further "supplementary" answers, supplied after these significant inaccuracies in the original answers were discovered by respondents, also proved to be inaccurate (Resp. App. 99a-100a, 115a-118a; Supp. App. 8a, 9a).[6]

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[5] The petitioners' reliance on the district court's statement that the "identity of the individuals in all, virtually all, cases would be useless" misinterprets the court's meaning, as the court itself subsequently pointed out (Supp. App. 12a). The district court has repeatedly stated that the *contents* of the informer files are essential to a fair trial of the central issue in the case, not because they reveal informers' identities, but rather because they reveal informer activities, and that the other methods of discovery on that issue have proved to be totally inadequate (Resp. App. 50a-57a, 90a-91a, 121a-125a, 149a; Supp. App. 21a-32a).

[6] The interrogatories, which had been broadly formulated to elicit at least some generalized information about the use of informers, were never contemplated by the parties or the court as more than a preliminary stage in discovery on the informer issue (Resp. App. 47a-52a).



The files of seven informers whose identities independently had become known to the respondents[7] were produced in the summer and fall of 1976. These seven files supplied neither a representative nor a comprehensive picture of the activities of the 1300 informers in question (Resp. App. 51a-52a).

Therefore, on August 5, 1976, respondents applied for an order directing the FBI to produce the files of 19 informers, selected by respondents from among the 1300 informers identified only by code number in the FBI's answers to interrogatories. Respondents selected the 19 with a view toward obtaining a representative sample of informers who played either important or typical roles with respect to the SWP and YSA.

The FBI made a blanket claim of privilege as to the informer files without reference to the particular documents ostensibly covered by the claim, by affidavit of the FBI official in charge of investigations. The government did not submit a formal claim of privilege by the Attorney General—or even by the FBI director—and it does not appear that the Attorney General or the FBI director ever reviewed the materials underlying the claim of privilege.

The district judge made an *in camera* review of the 19 files, relying in part on summaries prepared by the FBI at his request because the files, 25 drawers of material, were so voluminous. He concluded, after his review, that the informer files "undoubtedly constitute the most important

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[7] The first of these files was produced when a routine burglary arrest of one Timothy Redfearn by local police authorities in Denver led to the public identification of Redfearn as an FBI informer posing as a member of the YSA. His file, which was ordered disclosed over FBI objections, revealed that he had burglarized the offices of the SWP and YSA and the homes of their members for the FBI; it also exposed the falsity of interrogatory answers which related to him (Resp. App. 51a).

body of evidence in this case" (Supp. App. 28a), but that it was his duty as trial judge to minimize public disclosure. To this end, he determined that he required the assistance of respondents' counsel in selecting the smallest possible number of files to be disclosed publicly in order to try respondents' claims (Resp. App. 83a-84a). He thereupon ordered the disclosure of 18 files[3] to respondents' counsel, under strict protective order, on May 31, 1977. He concluded that the restricted production to respondents' counsel "involves no interference—or a negligible interference—with legitimate law enforcement and other interests sought to be protected by the FBI and other Government agencies" (Supp. App. 28a; and see Resp. App. 173a-175a). The government appealed this order and sought mandamus on July 1, 1977.

On October 11, 1977, the court of appeals denied the government's petition for mandamus and for review under 28 U.S.C. § 1291. The court of appeals enumerated the standards for interlocutory review of a pretrial discovery order, analyzed the case in light of those standards, and found that it met none of them. The court of appeals concluded that "it is by now well-established that a district judge, in the exercise of his discretion, may permit opposing counsel to participate in and assist him in the conduct of *in camera* proceedings under a pledge of secrecy" (Pet. 8A), and specifically held that the district judge had not abused that discretion in the present case. *Ibid.*

Contrary to the government's statement (Pet. 6), the court of appeals did not find that respondents "may well have no valid cause of action." On the contrary, the court noted that, although the government had "forcibly" advanced that argument, "these issues are not before us but will be determined by the District Court on the trial" (Pet. 9A).

[3] The government agreed to produce the nineteenth file, stating that the informer's identity had become known.



On November 16, 1977, the government submitted a petition for rehearing to the court of appeals with a suggestion for rehearing *en banc*. Both were denied on March 9, 1978; no active judge in the circuit voted for rehearing (Resp. App. 1a-2a).

Subsequent to the court of appeals' decision, the district judge made a second *in camera* review of the 18 files. In order to avoid further appeals and trial delays, he indicated a willingness to modify his order by making public nine of the files which seemed to him most significant. He explained his selection of the nine by detailing the tortious and criminal acts of the informers revealed in certain of these files, and as to others indicated that the information contained in them tended to refute the government's defense to the complaint (Resp. App. 85a-125a).

Contrary to the government's assertion, the district judge did not say that he was "prepared to rule that nine of the files were protected by the privilege" (Pet. 7). Indeed, he adhered to his earlier decision that the confidential production of all the files would be valuable to preparation and to litigation of the case, and said that he was proposing an alternative method simply in the hope of expediting the trial (Resp. App. 86a-91a).

Although the FBI had argued unsuccessfully before the court of appeals precisely for such a file-by-file ruling, it declined the proposal, and the district court adhered to its original decision (Resp. App. 163a-166a).

When the Assistant United States Attorney stated that the FBI ultimately might refuse to comply with any order to produce files, whether publicly or under protective order

to counsel, and might "accept sanctions"[9] for its refusal, the district judge commented that he would consider contempt proceedings against defiant officials, adding "but I can't deal with that in advance. I will face it when and if it comes . . . [W]e may not even have to reach that, and I hope we don't" (Resp. App. 129a, 132a). When the FBI again suggested the possibility of defying even a Supreme Court order to produce, the district judge again said the question was premature (Resp. App. 166a). He never suggested that the Attorney General might be cited for contempt; on the contrary, he stated explicitly: "I think that the matter, as far as contempt, would necessarily be a matter involving some person or persons at the FBI" (Resp. App. 168a).

## Reasons for Denying the Writ

This case does not present the issue asserted in the petition of a potential citation of the Attorney General for contempt (Pet. 10). There is no pending or impending contempt proceeding against anyone. The only relevant order of the district court, and the only order which was the subject of the government's application for mandamus in the court of appeals, directed the Federal Bureau of Investigation, not the Attorney General, to make a limited, non-public disclosure of relevant documents to respondents' counsel alone, so that all counsel could assist the Court, *in camera,* in determining what documents should be produced for use at trial. It is premature and speculative to consider the possibility of contempt by anyone since the FBI merely indicated a possible action by it and the district court expressly stated that it had no occasion to rule upon this threat and trusted that it would not materialize (Resp. App. 168a).

[9] Contrary to petitioners' statement (Pet. 7), the government did not offer to allow "every material fact respondents sought to acquire through discovery to be deemed admitted."



The sole questions actually raised by this case concern the circumstances under which interlocutory discovery orders may be reviewed by appeal or mandamus prior to final judgment. The Court already has issued definitive and controlling guidelines on these questions which were adhered to scrupulously by the court of appeals. Further review by certiorari would be duplicative and unnecessary, and indeed would undermine the very principle of finality which Congress and the Court consistently have sought to secure.

1. The final judgment rule, established by 28 U.S.C. § 1291, prohibits, with certain exceptions not relevant here, direct appeal of a district court's interlocutory order, of which the discovery order in this case indisputably is a prime example.[10] The requirement of finality as a condition of review "is an historic characteristic of federal appellate procedure" and "has been departed from only when observance of it would practically defeat the right to review at all." *Cobbledick* v. *United States,* 309 U.S. 323, 324-325. In recent years, the Court has reaffirmed the principles so clearly set forth in *Cobbledick. United States* v. *Ryan,* 402 U.S. 530, 532-533; *Kerr* v. *United States District Court,* 426 U.S. 394, 402-403. No reason has been advanced to re-evaluate that principle here.

2. Petitioners' reliance upon *United States* v. *Nixon,* 418 U.S. 683, as authority for their claim of appellate jurisdiction ignores the unique doctrinal and practical consider-

[10] See, *e.g., Borden Co.* v. *Sylk,* 410 F.2d 843, 845 (3d Cir. 1969); *American Express Warehousing, Ltd.* v. *Transamerica Ins. Co.,* 380 F.2d 277, 280, 284 (2d Cir. 1967).

ations upon which the Court relied in that case. The President is the Chief of State and the embodiment of the nation's sovereignty. He not only is the head of the Executive Branch, he "is the Executive Department," *Mississippi* v. *Johnson*, 4 Wall. 475, 500; *Cf.*, *Myers* v. *United States*, 272 U.S. 52, 123.

For these reasons, as the Court recognized, not only would it have been "unseemly" to require the President to refuse to comply with a court order in order to obtain appellate review, but it also would have raised the novel question of whether a President can be cited for contempt at all.[11] The protracted litigation that would have been engendered would have defeated the very purpose of the final judgment rule. Even more important, it would have raised the distinct possibility that there could be no final appealable order other than the order to produce the tapes which already was at issue. Under the circumstances, which indeed were *sui generis*, the Court held that the order to produce the presidential recordings was a final order within the meaning of Section 1291.[12]

Petitioners' effort to extend the rationale of the *Nixon* holding to permit an interlocutory appeal in the present case (Pet. 10) is frivolous.[13] In the first instance, as already noted, no order has been directed against the Attorney General. Second, if there were such an order, neither cabinet officers nor sub-cabinet officials are embodied with the attributes of sovereignty associated with the Presidency, and since the earliest days of the Republic have not been accorded the judicial deference due the President. See *Marbury* v. *Madison*, 1 Cranch 137, 165; *Kendall* v. *United States ex rel. Stokes*, 12 Pet. 524, 610. To extend the *Nixon* case holding to permit government officers other than the President to seek appellate review of interlocutory orders directed against them would constitute abandonment of the final judgment rule. The government or its officers is a party to hundreds, if not thousands, of civil cases every year; indeed, it is by far the most active litigant in the federal courts. By its decision in *Nixon*—a case unique in the constitutional history of the Republic—the Court certainly did not intend to open the gates to interlocutory appeals by the government whenever a district court orders a government officer to do something he does not wish to do.[14]

The final judgment rule, of course, does not absolutely preclude appellate consideration of interlocutory orders. In truly extraordinary situations the government or any other litigant may seek relief by means of a writ of mandamus or prohibition. But, as we show next, the court of

[11] This was the precise point made in this Court by the Special Prosecutor in conceding appealability in *United States* v. *Nixon* (Supplemental Brief for the United States on Appellate Jurisdiction, p. 8).

[12] See also *Nixon* v. *Sirica*, 487 F.2d 700, 706-7 and n. 21 (D.C. Cir. 1973).

[13] Petitioners add no force to their argument by reproducing a passage from the *Nixon* opinion and substituting in brackets the words "the Attorney General" for "a President" in the quotation (Pet. 10). Such a conclusory exercise merely emphasizes petitioners' failure to analyze or apply properly the doctrine of the *Nixon* case.

[14] General recognition of the unique status of the President in contrast to *all* other officials of the Executive branch appointed by him appears in President Nixon's brief in the court of appeals in *Nixon* v. *Sirica*, *supra*, distinguishing the President from the Secretary of State (p. 13), and in Solicitor General Bork's memorandum distinguishing the President from the Vice-President. *In re Proceedings of the Grand Jury Impaneled December 5, 1972*, Application of Spiro T. Agnew, Vice-President of the United States, D. Ct. Md. 73-965, Memorandum for the United States Concerning the Vice-President's Claim of Constitutional Immunity, *passim*. See also *Sawyer* v. *Dollar*, 190 F.2d 623 (D.C. Cir. 1951), *vacated as moot*, 344 U.S. 806, holding cabinet officers in contempt.

appeals was eminently correct in holding that mandamus was neither necessary nor appropriate in the present case.

3. Only two years ago the Court analyzed the circumstances under which mandamus is appropriate, and once again provided clear and precise guidelines to be followed by the appellate courts in considering applications for issuance of the writ. *Kerr* v. *United States District Court*, 426 U.S. 394. The court of appeals' decision in this case strictly followed the standards reaffirmed in *Kerr*. Petitioners have advanced no cogent reason for the Court to reconsider its long line of decisions on the subject.

The point this Court emphasized in *Kerr*, as well as in its earlier mandamus decisions, is that the "remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." 426 U.S. at 402. See also *Ex Parte Fahey*, 332 U.S. 258, 260; *Will* v. *United States*, 389 U.S. 90, 95. It is not to be used merely to correct an erroneous ruling by the district court. *Parr* v. *United States*, 351 U.S. 513, 520; *Schlagenhauf* v. *Holder*, 379 U.S. 104, 112. Rather

> . . . the writ "has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" . . . And, while we have not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes "jurisdiction," . . . the fact still remains that only "exceptional circumstances amounting to a judicial 'usurpation of power' will justify invocation of this extraordinary remedy."

*Kerr*, 426 U.S. at 402 (citations omitted).

Elsewhere, the Court has defined the "special circumstances" constituting a "usurpation of power" as limited



to (1) action "so palpably improper" as to place it beyond the scope of the authority conferred on the district courts by the Federal Rules of Civil Procedure, *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 256, (2) "an abdication of the judicial function," *id.*; or (3) a "clear abuse of discretion." *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 383. In addition, the Court has suggested that mandamus might be available to review important legal questions of first impression. *Schlagenhauf* v. *Holder*, 379 U.S. 104, 110.

The test applied by the court of appeals in this case (Pet. 4A) precisely followed the guidelines established by the Court:

> . . . [I]n the absence of a § 1292(b) certification, a persistent disregard of the Rules of Civil Procedure or a manifest abuse of discretion, interlocutory review of pretrial discovery orders [is] not permitted. . . . [R]eview [also] might be allowed where the case presents legal questions of first impression or of extraordinary significance.

The court of appeals found that the tests for issuing mandamus were not met in the instant case. First, it noted, the "question of informer privilege is, of course, not of first impression" (Pet. 5A). Prior decisions of this Court and of the lower federal courts made clear that the privilege is not absolute and require the district court to engage in a delicate balancing process: "[W]here the disclosure of an informer's identity, or of the contents of his communication . . . is essential to a fair determination of a cause, the privilege must give way." *Roviaro* v. *United States*, 353 U.S. 53, 60-61. See also *United States* v. *Fernandez*, 506 F.2d 1200, 1202 (2d Cir. 1974); *Westinghouse Electric Corp.* v. *City of Burlington*, 351 F.2d 762, 767, 768 (D.C. Cir. 1965). The trial court has jurisdiction and dis-

cretion to order disclosure or to uphold the privilege given "the particular circumstances of each case." *Roviaro, supra,* 353 U.S. at 62.[15]

Consequently, as the court of appeals noted, the district court did not usurp power or abuse its discretion in undertaking to determine whether and to what degree the asserted privilege should be upheld, first by reviewing the informer files *in camera,* and subsequently by ordering their limited disclosure to respondents' counsel under a protective order. Indeed, procedures for the determination of claims of privilege similar or identical to that followed by the district court have been upheld or suggested by this Court and by the Court of Appeals for the District of Columbia Circuit. *Cf., United States* v. *Nixon,* 418 U.S. 683, 715 n.21; *Kerr* v. *United States District Court, supra; Black* v. *Sheraton Corp. of America,* 564 F.2d 531 (D.C. Cir. 1977).[16]

[15] The FBI Manual specifically directs agents to "condition" informers to the fact that they may be called upon to testify about the information provided. *FBI Manual of Instructions,* §107, p. 8. And see Resp. App. 95a, 96a, 100a, 112a, 114a, 118a, 120a-121a.

[16] The district court below anticipated by several months the procedure suggested by the D.C. Circuit in the *Black* case:

> . . . [T]he district court [should] have accepted the proffered file for *in camera* inspection. At that time the government could have supplied an index correlating indexed items with particular claims of privilege. At that time the government could also have supplied an analysis containing descriptions specific enough to identify the basis of the particular claim or claims. The plaintiff would have been permitted to see this analysis and take issue with its conclusions, but the court would make the final determination after an *in camera* examination of the documents. If this procedure proved unworkable, plaintiff's counsel might have been permitted limited access to the raw file. But until an attempt was made to resolve the issue in a less intrusive way, we think that [public] disclosure [of the file] should not have been ordered.

564 F.2d 531, 545 (D.C. Cir. 1977).

If anything, the district court in this case was even more cautious and protective of the government. Unlike the district court in *Black,* the district court here examined both the files and the summaries describing the activities that were relevant to the litigation. It then made 18 files available only when convinced of the respondents' need for them, that they were relevant to the litigation, and that the court could not responsibly rule on the claims of privilege without the participation of all counsel.



Petitioners concede that mandamus ordinarily is not an appropriate remedy to review a pretrial discovery order (Pet. 8), but urge a general exception for claims of privilege on the asserted ground that such claims "cannot be evaluated under ordinary rules of procedure" (Pet. 9). Petitioners' argument is contrary to recent decisions of this Court which have applied the usual mandamus standards to privilege claims and have declined to order mandamus absent a clear showing that the district court usurped power or abused its discretion. *Kerr* v. *United States District Court, supra; Will* v. *United States, supra;* see also *City of Los Angeles* v. *Williams,* 438 F.2d 522, 523 (9th Cir. 1971).[17] Adherence to this practice is essential to maintain the integrity of the final judgment rule.

4. In denying mandamus here, the court of appeals held that the district court not only had power to adopt the procedures followed, but also that it *in fact* did not abuse its discretion by the way in which it exercised those powers, *i.e.,* by ordering limited disclosure to counsel in light of its finding of the relevance and compelling need for the files.[18]

[17] Petitioners' citation of *Maness* v. *Meyers,* 419 U.S. 449, is inexplicable. *Maness* was an appeal from a final judgment of contempt. It upheld the right of counsel to advise his client to continue to assert his Fifth Amendment privilege to the point of securing a contempt order, so that the issue could be reviewed on appeal. No departure from the ordinary final judgment rule was sanctioned or suggested.

[18] This distinguishes the court of appeals' decision from the rulings in *Usery* v. *Ritter,* 547 F.2d 528 (10th Cir. 1977), and *United States* v. *Hemphill,* 369 F.2d 539 (4th Cir. 1966), upon which petitioners seek to rely (Pet. 9). In each of the latter two cases the court of appeals found that the district court had abused

The court of appeals' view is entitled to great deference by this Court, and ordinarily should not be disturbed. *Kerr* v. *United States District Court, supra,* 426 U.S. at 402; *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 25; *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 260.

In any event, the soundness of the court of appeals' judgment is apparent from a brief review of the proceedings in the district court (which were not set forth fully and accurately by petitioners). The district court acted with commendable patience and after long deliberation. The limited disclosure order came after four years of thorough pretrial proceedings and on the eve of trial. It was issued only after a remarkably careful *in camera* review by the district court of the 18 files and of detailed summaries prepared by the government, a process which occupied the court for many months.

Second, the district court ordered disclosure only after specifically finding that the information contained in the files was the best evidence available in support of the respondents' allegations and was essential to a fair deter-

its discretion *in fact* by ordering public disclosure of informers' identities where concededly there was no necessity for such disclosure. *Hemphill,* 369 F.2d at 542; *Usery,* 577 F.2d at 531. See also *Metros* v. *United States District Court,* 441 F.2d 313, 317 (10th Cir. 1970). Both the *Usery* and *Hemphill* courts recognized, however, that the informer privilege is not absolute and requires the district court to engage in a balancing process to determine whether or not disclosure is warranted. Both courts applied the mandamus standards established by this Court and applied by the court of appeals in this case, and both recognized that mandamus ordinarily is not available to review discovery orders, including claims of informer privilege, unless there has been a manifest usurpation of power or abuse of discretion by the district court: "Of course, if the order is within the range of the discretion vested in the District Judge, it is not reviewable on a petition for a writ of mandamus." *Hemphill,* 369 F.2d at 544 n. 7; see also *Usery,* 547 F.2d at 532.

Thus, petitioners' suggestion (Pet. 9) that there exists a conflict in circuits which the Court should resolve is completely inaccurate.



mination of respondents' claims for damages and for injunctive relief. (Resp. App. 50a-57a, 91a-94a, 121a-123a). The court further found that the files contained information far more relevant and complete than had been revealed through the previous discovery in the case, and, indeed, that they showed that the FBI had not been honest in some of its previous answers to interrogatories (Resp. App. 99a-100a; Supp. App. 8a, 9a).

Third, the district court proceeded with extreme caution. Only 18 of the 1300 informer files were ordered disclosed, and then only to respondents' counsel, under a protective order, so that all counsel could assist the court in isolating the relevant and material information to be introduced at trial.[19] The district court stated that such assistance was necessary if it were to limit disclosure without depriving respondents of discovery material essential to their case (Supp. App. 29a-32a).

The district court's findings on these questions were made with the thorough understanding and knowledge of the facts and the lengthy record which only a trial court can have. These findings were entitled to the deference they were given by the court of appeals. No reason exists for this Court to further review such matters.

5. Petitioners are incorrect in suggesting that the district court failed to consider "legal questions that would obviate any need for discovery" (Pet. 14).[20] In fact, the

[19] Petitioners have misread the court of appeals' concern about "wholesale disclosure" (Pet. 6), which referred to a potential discovery beyond the 18 files.

[20] The present case, of course, does not seek damages for the use of informers, *per se,* but rather for specific tortious and unconstitutional actions taken by the informers against respondents. Thus the cases cited in the petition (Pet. 13, n. 13) upholding the use of informers for mere information-gathering purposes in the

district court denied the government's motion to dismiss respondents' Federal Tort Claims Act causes of action because of unresolved questions of fact which were inseparable from the jurisdictional issues, including the statute of limitations issue raised by the government (Resp. App. 3a-6a, 9a-21a). After the court of appeals' decision, the district court *sua sponte* undertook to determine once more whether there were grounds for dismissing the Federal Tort Claims Act claims (Resp. App. 58a). It found that its "renewed labor over this topic had really reinforced [its] view that there is no justification in dismissing" those claims on the present record (Resp. App. 59a), and outlined in detail its reasoning (Resp. App. 60a-83a). The court concluded that the informer files themselves indicate potential causes of action under the Federal Tort Claims Act, and include materials relevant to the statute of limitations question

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course of *bona fide* criminal investigations have no relevance to the causes of action asserted by respondents in this case.

Petitioners' reference to the earlier opinion of the court of appeals in this case, which vacated an order entered by the district court in late 1974 enjoining the mere presence of informers at a public convention of YSA (510 F.2d 253), is particularly inapposite to the present issues. First, as just noted, respondents presently seek relief against unlawful activities undertaken by informers, not their mere presence. Second, the circumstances upon which the opinion of the court of appeals was based have fundamentally changed.

On September 9, 1976 the Attorney General ordered the FBI to terminate the investigations of the SWP and YSA. The FBI director in turn ordered that informers be instructed that they were no longer to report to the FBI on the SWP and YSA. Thus, there is no longer even a colorable claim of a legitimate ongoing criminal investigation of the respondents. Furthermore, there have been four years of discovery since the earlier opinion of the court of appeals was rendered, the district court has developed a full and lengthy record, and the parties are on the eve of trial. Thus, the two grounds cited in the opinion for vacating the order of the district court—the necessity for protecting an ongoing investigation and the prematurity of such an order in the early stages of discovery—no longer obtain.



and the other jurisdictional issues raised by the government. The court also found that the informer files would be necessary to adjudication of respondents' claims not only for damages but also for injunctive relief (Resp. App. 91a-96a; Supp. App. 51a-53a). The government quite properly has not sought appellate review of these interlocutory rulings of the district court, and the issues are not before the Court.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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